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Lee Hee Hong v Eon Bank Bhd (now known as Hong Leong Bank Bhd)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(IM)-2512—11 OF 2013
AZAHAR MOHAMED, TENGKU MAIMUN AND HAMID SULTAN JJCA
20 JUNE 2014

Civil Procedure — Judgments and orders — Judgment in default — Setting aside, of — Appeal against — Defendant applying to set aside default judgment after having agreed for judgment to remain subsisting as part of settlement negotiations — Delay in applying to set aside — Whether defendant had defence on merits

The plaintiff/respondent had granted loan facilities to the first defendant company. The other defendants were the guarantors for the facilities. On 15 April 2010, the plaintiff filed this action against the defendants for the amounts due under the facilities. There being no appearance entered by the defendants, the plaintiff obtained judgment in default ('JID') against all the defendants on 17 June 2010. On 22 July 2010, the plaintiff issued a letter of offer to restructure the facilities subject to, inter alia, the condition that the JID was to remain subsisting. The fourth defendant/appellant accepted the condition by his signature accepting the offer. About three years later, the fourth defendant applied to set aside the JID. The High Court dismissed the application and hence, the present appeal. The fourth defendant contended that the delay in setting aside the JID ought to be disregarded as he had a defence on the merits. The essence of the fourth defendant's contention was that the plaintiff had unconscionably obtained JID when parties were negotiating for settlement and that the plaintiff's condition in the letter of offer (for the JID to remain) was tainted with mala fide.

Held, dismissing the appeal with costs RM5,000:

(1) There was no proposed or draft statement of defence filed by the fourth defendant to show that he had a defence on the merits (see para 13).

(2) The contemporaneous documents certainly did not support the fourth defendant's contention. The fourth defendant had not disputed liability and had expressly agreed that the JID subsist. The contention that the plaintiff was mala fide in obtaining the JID and that the JID was aimed at putting the fourth defendant in a disadvantaged position was therefore devoid of any merit. Having accepted the terms and conditions in the

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letter of offer which included the terms on the JID, the fourth defendant could not now be heard to complain about the very same terms that he had agreed to (see para 14).

[Bahasa Malaysia summary

Plaintif/responden telah memberikan kemudahan pinjaman kepada syarikat defendan pertama. Defendan-defendan lain adalah penjamin untuk kemudahan tersebut. Pada 15 April 2010, plaintif memfailkan tindakan ini terhadap defendan-defendan untuk jumlah yang kena dibayar di bawah kemudahan tersebut. Memandangkan defendan-defendan tidak hadir, plaintif memperolehi penghakiman ingkar ('PI') terhadap kesemua defendan pada 17 Jun 2010. Pada 22 Julai 2010, plaintif mengeluarkan surat tawaran untuk menyusun semula kemudahan tersebut tertakluk kepada, antara lain, syarat bahawa PI kekal wujud. Defendan keempat/perayu menerima syarat tersebut dengan tandatangannya menerima tawaran tersebut. Lebih kurang tiga tahun kemudiannya, defendan keempat memohon untuk mengetepikan PI tersebut. Mahkamah Tinggi menolak permohonan dan maka, rayuan ini. Defendan keempat berhujah bahawa kelewatan dalam mengetepikan PI tersebut patut dikecualikan kerana dia mmepunyai pembelaan atas merit. Inti pati hujahan defendan keempat adalah bahawa plaintif telah secara salah memperolehi PI apabila pihak-pihak berunding untuk penyelesaian dan bahawa syarat plaintif dalam surat tawaran (untuk PI kekal) dicacatkan dengan mala fide.

Diputuskan, menolak rayuan dengan kos sebanyak RM5,000:

(1) Tidak terdapat cadangan atau draf pernyataan pembelaan difailkan oleh defendan keempat untuk menunjukkan bahawa dia mempunyai pembelaan atas merit (lihat perenggan 13).

(2) Dokumen-dokumen sokongan dengan jelas tidak menyokong hujahan defendan keempat. Defendan keempat tidak mempertikaikan liabiliti dan dengan nyata bersetuju bahawa PI wujud. Hujahan bahawa plaintif adalah mala fide dalam memperolehi PI tersebut dan bahawa PI adalah ditujukan untuk meletakkan defendan keempat dalam kedudukan yang merugikan adalah oleh itu tidak mempunyai apa-apa merit. Setelah menerima terma dan syarat di dalam surat tawaran yang memasukkan terma ke atas PI, defendan keempat tidak boleh kini didengar mengadu mengenai terma yang sama yang telah dipersetujuinya (lihat perenggan 14).]

Notes

For cases on judgment in default, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 5077–5108.

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Cases referred to

Malayan United Bank Bhd v Mohammed Salleh bin Mohammed Yusoff & Ors [1988] 3 MLJ 165, HC (refd)
Syarikat Amin Enterprises v Edwina Lau [2007] MLJU 314, HC (refd)
Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30, FC (refd)
Yayasan Melaka v Photran Corporation Sdn Bhd & Anor [2012] 7 MLJ 1, HC (refd)

Legislation referred to

Appeal from: Civil Suit No 22–262 of 2010 (High Court, Pulau Pinang)

Diana Priya (Phee, Chen & Ung) for the appellant.
Lim Poh Leong (Ong Bee Khoon with him) (Gibb & Co) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] This is the fourth defendant's appeal against the decision of the learned judicial commissioner in dismissing his application to set aside the judgment in default obtained by the plaintiff on 17 June 2010. For ease of reference, parties will be referred to as they were in the High Court.

[2] In brief, the background facts are as follows. On or about August 2004, the plaintiff had granted loan facilities to the first defendant company. The fourth defendant was one of the guarantors for the facilities (p 95 *rekod rayuan*).

[3] On 22 October2009, the first defendant filed a civil suit against the plaintiff (p 68 *rekod rayuan*), claiming for general damages and exemplary damages in the sum of RM20,000,00. It was pleaded by the first defendant that the plaintiff had wrongfully, without notice, refused to allow the first defendant to utilise the trade facilities, resulting in the first defendant suffering from loss of business and reputation.

[4] On 15 April 2010, the plaintiff filed this action against the first defendant as the borrower and against the second to the fourth defendants as guarantors, for the amounts due under the facilities granted to the first defendant. There being no appearance entered by the defendants, the plaintiff obtained judgment in default against all the defendants on 17 June 2010 (p 19 *rekod rayuan*).

[5] On 22 July 2010, the plaintiff issued a letter of offer to restructure the facilities granted to the first defendant (p 78 *rekod rayuan*). The letter to the first

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A defendant was addressed to the attention of the fourth defendant. The letter of offer states, inter alia:

> However, the above restructuring is subject to the following:
>
> (1) The Borrower is to deposit 6 postdated cheques for monthly servicing of interest due ...
>
> (2) That the Borrower and Guarantors undertake by the acceptance of this revised Letter of Offer that the Judgment in Default entered against them on June 17, 2010 is to remain subsisting.
>
> (3) That the borrower is to withdraw the legal action Civil Suit No 22-681-2009 filed against EON Bank Berhad with no liberty to file afresh and with costs to be solely borne by the said Borrower.
>
> (4) ...

[6] The fourth defendant, as one of the authorised signatories of the first defendant, accepted the above terms and conditions as evidenced by his signature accepting the offer on 22 July 2010 (p 81 *rekod rayuan*).

[7] About three years later, ie on 6 June 2013, the fourth defendant filed the application to set aside the judgment in default. Vide his affidavit in support (p 10 *rekod rayuan*), the fourth defendant deposed that:

> Saya mengatakan bahawa pada masa yang material, setelah Plaintif secara memecah kontrak dan secara salah menarik balik kemudahan pembankkan yang diberi kepada Defendan Pertama atau peminjam, Plaintif telah disaman oleh peminjam melalui kes No 22-681-2009 di Mahkamah Tinggi Malaya di Pulau Pinang ...
>
> 6. Saya mengatakan bahawa kes ini merupakan satu tindakan strategik yang diambil oleh Plaintif setelah disaman oleh Peminjam melalui kes yang tersebut di perenggan di atas.
>
> 7. Saya dengan sesungguhnya mengatakan bahawa pada masa tersebut, peminjam juga telah melaporkan tindakan Plaintif yang salah tersebut ke Bank Negara Malaysia.
>
> 8. Saya dengan sesungguhnya mengatakan bahawa melalui mediasi Bank Negara Malaysia, kedua-dua pihak sepatutnya memegang kedudukan (hold their position) mengenai kes ini dan kes no. 22-681-2009 itu. Pihak peminjam telah mengikut nasihat dari Bank Negara Malaysia tetapi pihak Plaintif dalam prosiding ini telah secara mala-fide telah mengambil kesempatan tempoh *cease fire* itu dan tanpa notis kepada peminjam ataupun kepada saya telah memasukkan penghakiman ingkar dalam ini.
>
> 9. Saya mengatakan bahawa atas kelakuan Plaintif ini, penghakiman ingkar dalam ini haruslah diketepikan.

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10. Saya juga mengatakan bahawa pada atau sekitar 20-8-2010, pihak Plaintif telah merepresentasikan kepada peminjam bahawa pihak Plaintif bersetuju untuk susun semula kemudahan pembankkan yang diberikan kepada peminjam atas balasan peminjam tarik balik kes no. 22-681-2009 itu. Saya dengan sesungguhnya mengatakan bahawa kes no. 22-681-2009 itu telah ditarik balik oleh peminjam dalam bulan September 2010.

11. Saya mengatakan bahawa adalah dipersetujui bahawa balasan peminjam tarik balik no. 22-681-2009 terhadap Plaintif adalah sebagai balasan kemudahan yang secara salah ditamatkan itu disusun semula dan ini juga bermakna penghakiman ingkar dalam ini telah dianggap selesai selepas pihak Plaintif mencapai *accord and satisfaction* dengan peminjam.

12. Secara memungkiri perjanjian yang terdapat di antara Plaintif dan peminjam, Plaintif telah gagal untuk susun semula kemudahan pembankkan peminjam.

13. Tambahan pula, Plaintif telah bertindak secara *unconscionable* memulakan tindakan kebankrapan terhadap saya berdasarkan penghakiman ingkar yang telah dianggap selesai atas accord and satisfaction di mana peminjam bersetuju menarik balik kes 22-681-2009 sebagai balasan untuk Plaintif susun semula kemudahan pembankkan.

14. Saya juga telah difahamkan bahawa untuk kemudahan yang sepatutnya disusun semula (reinstate) itu, saya akan diganti oleh seorang pengarah peminjam yang bernama Sahat Ahmad sebagai penjamin.

15. Saya dengan sesungguhnya mengatakan bahawa secara memungkiri persefahaman antara saya, peminjam dan Plaintif, pihak Plaintif gagal untuk mengambil apa-apa langkah untuk susun semula kemudahan pembankkan kepada peminjam atau melepaskan saya sebagai penjamin.

16. Akan tetapi sekali lagi, Plaintif tidak menunaikan persetujuan dan mencari alasan seperti tidak dapat perolehi surat jaminan dari Credit Guarantee Corporation Malaysia Bhd sebagai alasan untuk susun semula kemudahan yang Plaintif telah setuju untuk susun semula dan peminjam telah beri balasan dengan menarik balik kes terhadap Plaintif.

18. Saya mengatakan bahawa Plaintif tidak boleh mengambil kedudukan institusi tersebut yang lebih kuat untuk menekan peminjam dan penjamin-penjamin untuk menunduh (*sic*) kepada kehendak Plaintif yang unconscionable itu.

19. Saya juga dengan sesungguhnya mengatakan bahawa kedudukan kewangan peminjam dan penjamin-penjamin pada taraf sekarang adalah akibat daripada tindakan Plaintif yang melanggar

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A undang-undang dan *unconscionable* itu dan oleh itu Plaintif adalah tidak berhak untuk kekal memegang penghakiman ingkar tersebut terhadap saya.

20. Oleh itu saya pohon agar permohonan saya untuk mengetepikan penghakiman ingkar itu dibenarkan dengan kos dalam kausa dan saya
B diberi peluang untuk membela diri terhadap tuntutan Plaintif itu.

[8] The learned judicial commissioner dismissed the fourth defendant's application, hence the appeal before us.

C THE APPEAL

[9] As apparent from the background facts set out above, there was a delay of three years in the filing of the application by the fourth defendant.

D

[10] The reasons for the delay as averred by the fourth defendant in his Afidavit Balasan (p 48 rekod rayuan) are:

6. Tambahan pula, saya menyatakan bahawa sebab Defendan tidak memfailkan permohonan untuk mengenepikan Penghakiman Ingkar
E tersebut adalah kerana Plaintif telah melalui 'Letter of Offer' bertarikh 22-7-2010 telah bersetuju untuk menyusun semula ('restructure') Tradelines dan Overdraft Facilities dengan Defendan untuk menyelesaikan tindakan ini secara damai.

7. Plaintif juga secara mala fide mengenakan syarat dalam 'Letter of Offer'
F tersebut iaitu bahawa Defendan harus menarik balik tindakan guaman yang diambil terhadap Plaintif di bawah Guaman Sivil No 22-681-2009 manakala Penghakiman Ingkar yang dimasukkan terhadap Defendan akan dikekalkan. ...

8. Defendan telah membalas 'Letter of Offer' tersebut dan menyatakan kepada
G Plaintif bahawa Defendan hanya akan bersetuju dengan tawaran Plaintif jika Penghakiman Ingkar yang dimasukkan terhadap Defendan dibatalkan dan atau ditarik balik dan sebagai balasan Defendan juga akan menarik balik Guaman Sivil No 22-681-2009 tersebut ...

H **[11]** Citing *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30; *Yayasan Melaka v Photran Corporation Sdn Bhd & Anor* [2012] 7 MLJ 1; *Syarikat Amin Enterprises v Edwina Lau* [2007] MLJU 314 and *Malayan United Bank Bhd v Mohammed Salleh bin Mohammed Yusoff & Ors* [1988] 3 MLJ 165, learned counsel for the fourth defendant submitted
I that the delay in setting aside the judgment in default ought to be disregarded as the defendants have merits in this action.

[12] There was only one issue for our consideration ie whether the fourth defendant has a defence on the merits.

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[13] We noted that there was no proposed or draft statement of defence filed by the fourth defendant to show that he has a defence on the merits. Be that as it may, the essence of the fourth defendant's contention was that the plaintiff had unconscionably obtained judgment in default when parties were negotiating for settlement and that the plaintiff's condition in the letter of offer (for the judgment in default to remain and for the withdrawal of the suit by the first defendant against the plaintiff) was tainted with mala fide and was aimed at putting the defendants in a disadvantaged position.

[14] We are not able to agree with the submission of learned counsel for the fourth defendant. The contemporaneous document certainly does not support the fourth defendant's contention. The fourth defendant has not disputed liability and has expressly agreed that the judgment in default is subsisting. The contention that the plaintiff was mala fide in obtaining the judgment in default and that the judgment in default was aimed at putting the fourth defendant in a disadvantaged position is therefore devoid of any merit. Having accepted the terms and conditions in the letter of offer which includes the terms on the judgment in default, the fourth defendant cannot now be heard to complain about the very same terms that he had agreed to.

[15] The fourth defendant had made reference to a letter dated 4 August 2010 signed by one Alex H'ng the managing director of the first defendant stating thus:

> Your letter of offer dated 22 July 2010 ('the LO') to restructure the said Facility refers.
>
> We return herewith the LO duly signed together with our Board Resolution dated 22 July 2010 for your further action.
>
> However, as advised by our lawyer, our acceptance is subject to the following:
>
> Paragraph 2 on page 2 about the Judgment in Default being subsisting should be removed, unless it is expressly agreed that both parties entering into the restructuring the whole of facilities, it automatically nullifies the said Judgment in Default.
>
> As for Paragraph 3 on page 2, we accept the withdrawal of the suit but with each party bearing own costs in consideration of EBB removing paragraph 2 as aforesaid. Please attend to the necessary accordingly.

[16] It must be highlighted that firstly, only the fourth defendant is before us, challenging the judgment in default. Secondly, the letter written by Alex H'ng on behalf of the first defendant company was dated after the acceptance by the fourth defendant of the terms and conditions of the plaintiff's letter of offer.

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[17] Hence, it is our view that Alex's letter does not detract from the fact that the fourth defendant has acknowledged that the judgment in default against him remains.

[18] In the circumstances, we find no merit in the fourth defendant's appeal. The learned judicial commissioner has not erred in dismissing the fourth defendant's application to set aside the judgment in default. Accordingly, our unanimous decision was to dismiss the fourth defendant's appeal. We order costs of RM5,000 to be paid by the appellant to the respondent and that the deposit be refunded to the appellant.

Appeal dismissed with costs of RM5,000.

Reported by Kanesh Sundrum